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In the

Supreme Court of the United States

October Term, 1958

No. 1058 92

SERVICE STORAGE AND TRANSFER CO., INC.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

Brief and Appendix on Behalf of Respondent in Opposition to the Petition for a Writ of Certiorari

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SERVICE STORAGE AND TRANSFER CO., INC.,
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v.

COMMONWEALTH OF VIRGINIA,
Respondent

Brief on Behalf of Respondent in Opposition to the Petition for Writ of Certiorari

Respondent, believing that the matters set forth herein will demonstrate the lack of jurisdiction of this Court and, further, the lack of substance in the questions presented by this petition, files this brief in opposition to the petitioner's petition for writ of certiorari. The respondent includes the ground that the decision below was not rested on a federal question. The matters here relied upon are more particularly stated below.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

Service Storage and Transfer Company, Incorporated, hereinafter referred to as "Service" or "Petitioner" is a common carrier operating pursuant to the authority of certain certificates of convenience and necessity issued by the Interstate Commerce Commission. Service uses Bluefield,

West Virginia as a "gate way" to and from the Commonwealth of Virginia.

On September 19, 1956, the State Corporation Commission of Virginia issued a Rule (App. I) which reads, in part, as follows:

> "It appears to the Commission that Service Storage & Transfer Company, Incorporated, of Bluefield, West Virginia, was found to be hauling property in intrastate commerce without authority of the State Corporation Commission and in violation of Chapter 12, Title 56 of the Code of Virginia on the following occasions, to-wit:"

The above Rule was issued pursuant to the authority vested in the Corporation Commission by Section 56-304.12 (App. V). Thereafter a hearing was held by the Commission on November 29, 1956 and, on February 26, 1957, the Commission issued an order (App. II) finding that Service had transported property for hire between points in Virginia in intrastate commerce without the authority of the State Corporation Commission. On March 21, 1957, the Commission issued an opinion (App. III) in this matter. The opinion held that Service was guilty of operating as a common carrier by motor vehicle in intrastate commerce without a certificate of Convenience and Necessity from the Corporation Commission in violation of Section 56-278 (App. VI) of the Code of Virginia. Service was fined $500.00 for each of ten violations. This case was then appealed to the Supreme Court of Appeals of Virginia, which Court held that Service was in violation of Section 56-278 of the Code in seven of the ten instances in question and, therefore, affirmed in part and reversed in part the order of the Commission and directed the Commission to amend its order in conformity with the Court's opinion (App. IV). Service

was, therefore, fined $3500.00 for shipping goods by way of Bluefield, West Virginia in the following seven instances:

Origin	*Destination*
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia

The printed record contains the testimony of the investigators of the Division of Motor Transportation of the State Corporation Commission who stopped certain trucks owned and operated by the petitioner on Virginia highways. The investigators found that these vehicles were carrying goods from one point in Virginia to another point in Virginia without a certificate of convenience and necessity from the State Corporation Commission. It was stipulated at the hearing that all shipments in question were routed through Bluefield, West Virginia (R. 22). It is apparent from the evidence that the usual or normal route between two such points in Virginia was not followed by the petitioner. It is clearly shown by the evidence that the routes followed were in fact unnecessarily long and circuitous and were not the routes that the ordinary prudent man would use. An examination of a map of a portion of Virginia and West Virginia (R. Ex. 1) shows that, in one instance, a shipment moved 90 miles more than necessary had the most direct route been followed. The simplest example is presented by the shipment from Roanoke to Wytheville, which went to Bluefield, West Virginia and thence to Wytheville instead of moving directly down U. S. Route 11.

Had the petitioner moved the shipment in question by a

route which a reasonably prudent man would follow, the shipment would never have left the territorial boundaries of Virginia. The petitioner admits that there are instances when the shipment of goods between two Virginia points through Bluefield, West Virginia is not interstate commerce:

> "I don't know whether Mr. Siebert has been advised of this or not, that since the issuance of the last rule, many questionable operations were terminated, and, by reason of the delay involved to some of the shippers and consignees, we had to make adjustments, and some have not been able to make adjustments, to replace the carrier service afforded by respondent; and they have submitted charges to Mr. Seibert that there is nothing available for them to do and that they know there is interstate commerce through Bluefield and through Bluefield, West Virginia, and the billings are on interstate commerce billings, governed by interstate tariffs, and I feel confident everything I have said is factually accurate."

The petitioner does not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia. It had been fined before for a similar violation and did not appeal the decision of the Commission (R. 72-73) (App. III). It is manifest that the petitioner employed the unusual and circuitous routes in an attempt to evade the jurisdiction of the State Corporation Commission of Virginia. The Supreme Court of Appeals held that the Corporation Commission had properly fined Service in seven of the ten instances and the fine was, therefore, reduced to $3500.00.

QUESTIONS PRESENTED

The petitioner contends that the State Corporation Commission of Virginia is not vested with the authority or juris-

diction to make a factual determination in this case. Three specific questions are raised by the allegations in the petitioner's brief:

> "(1) Whether a state agency lawfully may impose criminal sanctions on a motor common carrier for conducting interstate operations in accordance with the carrier's interstate certificate of public convenience and necessity as construed by the Interstate Commerce Commission?
>
> "(2) Whether the enforcement of a state statute in a manner which requires discontinuance of motor carrier operations authorized by order of the Interstate Commerce Commission is in conflict with Part II of the Interstate Commerce Act and in contravention of the 'Commerce clause' of Article I, Section 8 of the Federal Constitution.
>
> "(3) Whether a state agency which desires a certificated interstate motor carrier to discontinue allegedly unlawful operations must seek relief from the Interstate Commerce Commission as provided in Section 204(c) of Part II of the Interstate Commerce Act."

ARGUMENT

The Decision of the Supreme Court of Appeals of Virginia Rested on Non-Federal Ground; Therefore, This Honorable Court Does Not Have Jurisdiction to Hear This Case.

The three questions presented by the Petitioner are somewhat overlapping and, therefore, we find it expedient to answer them as one. The sole question now before this Court involves a factual determination made by the State Corporation Commission (hereafter called the Commission) and affirmed by the Supreme Court of Appeals of Virginia (hereafter called the Court). The Commission's decision was rendered on February 26, 1957, and the Report of the I. C. C. on Petition (by Division 1) was handed down on

March 29, 1957, and was, therefore, not before the Commission when this case was decided. This Report of the I. C. C., Division 1 reads, in part, as follows:

> *"In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce.* This conclusion finds support in the fact that the routes employed between Virginia points are not unduly circuitous or impracticable but on the contrary are such as might normally be used by any carrier authorized to operate between the Virginia points involved, and that Bluefield, W. Va. is petitioner's headquarters and the base of other substantial operations to and from points in Virginia of which the operations challenged are only a small part." (Italics supplied)

The italicized language is pertinent herein. The Report shows on its face that a determination was reached as to the authority of the petitioner to operate under certain I. C. C. certificates. It is manifest that this Report was based on an assumption that the petitioner's use of such routes was not "* * * a subterfuge to avoid State regulation, or other than a logical or normal operation * * *." In the case now before this Court a factual determination has been made that the petitioner has in fact used these illogical and abnormal routes as a subterfuge to avoid State regulation. There is, however, no conflict between the opinion of the State Corporation Commission and the Report of the Interstate Commerce Commision. The State authorities have found that Service has attempted to evade State laws. The I. C. C. has determined that Service may use these routes when their operations are normal, logical and not in an

attempt to evade State laws. Service was not fined for moving these shipments in interstate commerce, but was penalized for carrying intrastate shipments without a Virginia certificate of convenience and necessity. It must, therefore, be concluded that there is no difference of opinion in this matter between the Interstate Commerce Commission and the State Corporation Commission. Both of these agencies have determined that Service may not use these I. C. C. certificates in an attempt to avoid State regulations.

The following language from the Court's opinion is pertinent:

> "An examination of the evidence which includes the map exhibits of Virginia and West Virginia clearly shows that the 'normal or usual' routes were not followed between the Virginia points involved. On the contrary, the shipments were hauled miles out of the way, over circuitous routes, in order to accomplish the purpose sought."

The Court therefore concluded that the long and circuitous routes employed by Service were not bona fide and were used as a subterfuge to avoid State regulations. The following reasoning employed in *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed 641, 646, 59 S. Ct. 532 is applicable here:

> "'Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238, 82 L. ed. 1304,

1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. * * * If appellant's hauling of the merchandise in question across the State line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. * * *.'"

This language from *Eastern Carrier Corporation* v. *U. S.*, 31 F. Supp, 232, 236, is also pertinent to this inquiry:

"'* * * Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state.'"

An examination of the Division 1 Report in the declaratory judgment proceeding reveals that these two cases were not considered. Indeed, no mention was made of them. The question then resolves itself to a determination of the good faith of petitioner.

The Court found that the routes employed by Service were not used in good faith.

Division 5 in the case of *Slagle Contract Carrier Application* 2 M. C. C. 127 discussed the term "bona fide," and the following language found at page 141 is applicable here:

> "The Latin words 'bona fide' mean 'in good faith,' Webster's New International Dictionary defines 'bona fide' as 'in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely.' As defined in Black's Law Dictionary, the words mean 'in or with good faith; honestly, openly, and sincerely; without deceit or fraud.' The Supreme Court in *Ware* v. *Hylton,* 3 U. S. 199, 241, defined them as follows:
>
> "Bona fide is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of Assembly of all the States, and signifies a thing done really, with a good faith, without fraud or deceit, or collusion, or trust." (2 M. C. C. 141-2)

It is manifest that there is no showing of good faith on the part of Service. The sole conclusion that can be reached is that these unnecessarily long routes were employed in an attempt to evade the laws of Virginia. Petitioner cites the case of *Roundtree* v. *Terrell,* 22 F. Supp. 297. The following language from that case is applicable here:

> "True it is that commerce is undoubtedly traffic plus intercourse, and the carriage of freight and passengers between two points in one state, during which route there is passage over the soil of another state, will not render that business foreign, which is domestic." (22 F. Supp. 300)

See also *Clark* v. *Public Service Commission,* 120 Atl. 2d 363.

It is suggested further by the petitioner that he will have to cease certain interstate operations. An examination of the Commission's opinion and the Court's ruling does not reveal this to be so. The Commission did not order Service to cease interstate operations. It merely fined Service for operating in intrastate commerce without a certificate of convenience and necessity. The Commission has raised no objection relative to the bona fide interstate operations engaged in by Service. The sole matters considered by the Commission relate to intrastate movements between two Virginia points which could be reached more reasonably by a direct route lying wholly within this State.

Service contends also that Section 49 U. S. C. 304(c) requires the Commission to petition the Interstate Commerce Commission for relief in this matter. This is manifestly an erroneous intepretation of the language in question. This section is not mandatory, nor does it remove from the jurisdiction of the Commission the power to regulate commerce within its borders. The shipments were purely intrastate in character, in that the direct routes between the points of origin and destination lay wholly within Virginia. The business was local in character. Therefore, the Commission is vested with the authority to regulate it. *Panhandle Eastern Pipe Line Company* v. *Michigan Public Service Commission*, 341 U. S. 329, 95 L. ed. 993. This Court said in the case of *Illinois Central Railroad Company* v. *DeFuentes*, 236 S. Ct. 157, 59 L. ed. 517, 520:

> "Problems relating alone to commerce wholly within the State must be left to the discretion of the State Commission, to be exercised upon a view of all existing, relevant facts and circumstances."

This case, therefore, is clearly distinguished from *Castle*

v. *Hayes Freight Lines*, 348 U. S. 61, in that there has been no attempt to prevent the petitioner's using the highways of Virginia for interstate commerce.

The definition of the term "interstate commerce" is found in Section 49 U. S. C. 303(10). The petitioner suggests that the Commission has attempted to change this definition. We suggest that this interpretation of the Commission's decision is incorrect. The Commission found in this case an attempt to escape State regulation by driving, in one instance 155 miles through mountains instead of 81 miles down a valley. A suggestion that such movements are in fact interstate in character is clearly without foundation.

The respondent respectfully submits that the factual determination made below is amply supported by the evidence and, therefore, there is no question involving the Interstate Commerce Act of Article 1, Section 8 of the U. S. Constitution. The respondent prays that this Honorable Court will dismiss the petition on the ground that the decision of the State courts below were based on a non-federal ground.

CONCLUSION

Wherefore, the respondent respectfully submits that, for the reasons stated, this Court does not have jurisdiction to review the decisions of the State courts below, since their decisions rest solely upon a non-federal ground, there being no federal question involved, and the respondent respectfully moves the Court to dismiss the petitioner's petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court–State Library Building
Richmond, Virginia

APPENDIX I

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

City of Richmond, September 19, 1956

Case No. 13182

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

RULE

It appears to the Commission that Service Storage & Transfer Company, Incorporated, of Bluefield, West Virginia, was found to be hauling property in intrastate commerce without authority of the State Corporation Commission and in violation of Chapter 12, Title 56 of the Code of Virginia on the following occasions, to-wit:

August 21, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, White tractor, Registration Card 18807, West Virginia license K-3345, shipment portable air compressor from Rish Equipment Company, Roanoke, Virginia, to Heron Todd Steel Construction Company, Incorporated, Glen Lyn, Virginia.

August 22, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, no registration, no identification marker, International truck, West Virginia license K-3329, shipment of cotton work clothing from Norfolk and Western

Industries, Incorporated, Lynchburg, Virginia, to Sutphin & Jackson, Draper, Virginia.

September 6, 1956, U. S. Highway No. 460, one mile north of Pearisburg, Virginia, Registration Card 18798, White tractor, West Virginia license K-3337, shipment TV picture tubes, Leonard Electronics of Roanoke, Incorporated, Roanoke, Virginia, to Wytheville Vance Company, Wytheville, Virginia; kitchen cabinet sinks and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to Buchanan Furniture Company, Coeburn, Virginia; kitchen cabinet sink and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to Clinchfield Coal Corporation, Coeburn, Virginia; kitchen cabinet and parts, Roanoke Wholesalers, Incorporated, Roanoke, Virginia, to Electric Appliance Company, Big Stone Gap, Virginia, and motor parts from Southwest Motor Parts Corporation, Roanoke, Virginia, to Oakwood Motor Company, Oakwood, Virginia.

September 11, 1956, U. S. Highway No. 58, near St. Paul, Virginia, Registration Card not shown, Assigned Number VCC-208, White tractor, West Virginia license 3341, shipment cotton goods from F. D. Lazenby & Company, Bluefield, Virginia, to Haysi Hardware & Furniture Company, Haysi, Virginia, and shipment steel plates, Bristol Steel & Iron Works, Incorporated, Bristol, Virginia, to Link Belt Company, Carbo, Virginia.

September 17, 1956, junction U. S. Highway 58 and 72 at Coeburn, Virginia, Exemption Card E-194, Classification Plate same number, Virginia license T-220-690, International truck, shipment medicine, Miles Laboratories, Incorporated, Roanoke, Virginia, to Kilgore Grocery Company, Coeburn, Virginia; shipment iron railway car wheels, Enterprise Wheel & Car Corporation, Bristol, Virginia; to Banner Fuel Corporation, Cranes Nest, Virginia; shipment steel beams, Bristol Steel & Iron Works, Incorporated, Bristol, Virginia, to Quesenberry Construction Company,

Wise County Court House, Wise, Virginia and shipment medicine from Miles Laboratories, Incorporated, Roanoke, Virginia, to Coeburn Grocery Company, Coeburn, Virginia.

September 18, 1956, U. S. Highway No. 58, five miles west of Gate City, Virginia, Assigned Number E-194, Virginia license T-220-699, International truck, two shipments automobile supplies, Southwest Motor Parts Corporation, Roanoke, Virginia, to Kelly Motor Company, Big Stone Gap, Virginia. September 19, 1956, U. S. Highway No. 11, five miles west of Abingdon, Virginia, Assigned Number E-194, Virginia license T-220-690, International truck, shipment candy from Harris Woodson Company, Incorporated, Lynchburg, Virginia, to City Food Market, Coeburn, Virginia.

September 19, 1956, U. S. Highway No. 11, five miles west of Abingdon, Virginia, Assigned Number E-194, Virginia license T-220-697, International tractor, shipment TV set, Bluefield Hardware Company, Roanoke, Virginia, to Wise Hardware, Norton, Virginia.

A rule is hereby awarded, returnable at the court room of the State Corporation Commission in the State Office Building in the City of Richmond at 10:00 o'clock, a.m., on October 30, 1956, requiring Service Storage & Transfer Company, Incorporated, to appear and show cause, if any can be shown, why it should not be fined or otherwise penalized and why any and all authority issued to the said corporation should not be suspended or canceled as provided in Section 56-304.12 of the Virginia Code.

A copy of this rule shall be served on the Secretary of the Commonwealth and a copy shall be served on the agent of Service Storage & Transfer Company, Incorporated, at Roanoke, Virginia, and a copy sent by first class United States Mail to Service Storage & Transfer Company, Incorporated, Drawer 310, Bluefield, West Virginia.

APPENDIX II

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

City of Richmond, February 26, 1957

Case No. 13182

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

On November 29, 1956, came on for hearing the rule issued against Service Storage & Transfer Company, Incorporated, for specified violations of Chapter 12, Title 56 of the Code of Virginia in transporting property for hire between points in Virginia in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny and O. L. Shewmake appeared for the defendant. William C. Seibert appeared for the Commission.

The testimony shows and the defendant admits the transportation of property for compensation between the points in Virginia set forth in the rule.

From the following Virginia points of origin to the destinations shown, the only normal, regular or usual route is intrastate:

Origin	*Destination*
Bluefield, Virginia	Haysi, Virginia
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bristol, Virginia	Cranes Nest, Virginia
Bristol, Virginia	Wise, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Kimbleton, Virginia
Roanoke, Virginia	Abingdon, Virginia

and the Commission finds that the transportation of goods from the above named origin points to the above named destination points in the State of Virginia is in violation of Chapter 12, Title 56 of the Code of Virginia; and it appearing that by order in Case No. 13074 the defendant was fined $25.00 for the transportation of property intrastate over the same or similar routes it is

Adjudged, Ordered and Decreed, That the defendant be fined $500.00 for each of the said violations, making a total of $5,000.00, together with the costs of this proceeding; and that a writ of fieri facias do issue in favor of the Commonwealth of Virginia against the defendant.

APPENDIX III

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

March 21, 1957

Case No. 13182

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, Chairman.

This case is a prosecution of the defendant for operating as a common carrier by motor vehicle in intrastate commerce on the highways of Virginia without a certificate of public convenience and necessity in violation of § 56-278 of the Code of Virginia. The defendant holds certificates of public convenience and necessity issued by the Interstate Commerce Commission, but none from this Commission. There is no dispute as to the facts. The legal problem is where to draw the line between interstate and intrastate commerce. The defendant's I. C. C. certificates, of course, expressly limit the defendant's operations to interstate commerce. Notwithstanding the generality of the language in those certificates describing the geographical boundaries in which defendant may operate, the certificates contain a limiting clause to the effect that the holder of the certificate is granted authority:

"* * * to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle * * *"

Our inspectors discovered that the defendant was holding itself out as a common carrier to transport and was tranporting property for compensation between numerous points in Virginia. Accordingly a rule was issued under § 56-304.12 of the Code, which provides:

"The Commission may, by judgment entered after a hearing * * * if it be proved that the defendant * * * has violated any law of this State regulating the operation of motor vehicles for compensation on the highways of this State * * * impose a penalty, not exceeding one thousand dollars, which shall be collectible by the process of the Commission as provided by law."

Pursuant to the applicable provisions of the State Constitution the Commission, in cases of this kind, sits judicially as a court of record. The Commission fined the defendant $500 for each of ten specified violations of the law, making a total of $5,000 and costs; and issued a writ of fieri facias. Execution of the writ will be held in abeyance so long as defendant's petition for a writ of *supersedeas* is pending in the Supreme Court of Appeals.

The large size of the fine (one-half the maximum provided by law) is because in a prior case involving the same defendant, the same course of conduct and the same law, the Commission fined the defendant $25 for the purpose of settling the law of the case. The defendant paid the fine, did not take an appeal, and continued to operate in the same manner as before. Since $25 is all it costs to get a certificate of public convenience and necessity, it is manifest that the fine will have to be adjusted upward until it has a deterrent effect.

The prior case was Case No. 13074. It was heard on June 28, 1956, and final judgment was entered on July 9, 1956.

Our decision in that case is *res judicata* in this case. Pursuant to the authority conferred on it by § 155 of the Constitution, the Commission has adopted the following rule:

"15. *Res Judicata.* The doctrine of *res judicata* applies to final judgments, orders and decrees entered by the Commission sitting as a court of record. It does not apply in cases in which the Commission has a duty of continuous supervision or in any case in which a matter is reserved for further consideration."

The final order in that case is as follows:

"COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

City of Richmond, July 9, 1956

Case No. 13074

COMMONWEALTH OF VIRGINIA, at the relation of the
STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY,
INCORPORATED

On June 28, 1956, came on for hearing the rule awarded against Service Storage & Transfer Company, Incorporated, alleging the transportation of property in intrastate commerce without authority of the State Corporation Commission, Commissioners Hooker, King and Catterall sitting.

Francis W. McInerny appeared as counsel for the defendant. William C. Seibert appeared for the Commission.

It appearing to the Commission that from the evidence submitted the defendant did, as alleged in the rule of the

Commission of June 11, 1956, transport property in intrastate commerce without the authority of the State Corporation Commission in violation of Chapter 12, Title 56 of the Code of Virginia, of a fine of $25.00 and costs of the proceeding shall be assessed against the said defendant.

It Is, Therefore, Ordered:

(1) That Service Storage & Transfer Company, Incorporated, be, and it is hereby, fined the sum of $25.00 and costs of the proceeding.

(2) A copy of this order shall be sent to Francis W. McInerny, counsel for the defendant."

The Commission delivered the following opinion in that case:

"COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

July 9, 1956

Case No. 13074

COMMONWEALTH OF VIRGINIA, at the relation of the STATE CORPORATION COMMISSION

v.

SERVICE STORAGE & TRANSFER COMPANY, INCORPORATED

Opinion, Catterall, Commissioner.

This is a rule to show cause why the defendant should not be punished for operating intrastate in Virginia as a common carrier of property without a certificate of convenience and necessity from this Commission.

The defendant admits the facts alleged in the rule. Its

defense is that it can lawfully transport goods between Virginia points so long as it carries them out of the state and back again. It asserts, for example, the right to carry goods from Roanoke to Wytheville (which is 80 miles down Route 11), so long as it hauls them 160 miles around by Bluefield, W. Va.

Its federal certificate authorizes the defendant to engage in *interstate* commerce within 75 miles of Bluefield; the certificate specifies territory and not routes. If an I. C. C. certificate can and does grant the authority claimed by the defendant, the state commissions might as well go out of business.

The defendant relies on Atlantic Freight Lines, Inc., 51 M. C. C. 175 (1949) in which Division 5 of the Interstate Commerce Commission ruled that a movement from Pittsburgh to Philadelphia was interstate commerce if the movement goes by way of Baltimore.

Now there can be no doubt that a movement from a point in a state to another point in the same state is *sometimes* interstate commerce. The interesting question is whether the interstate character of the movement turns on whether *it is* an interstate movement or whether the I. C. C. *says* it is an interstate movement. Division 5 favors the latter view. In *Eichholz* v. *Missouri P. S. C.*, 306 U. S. 268, the Supreme Court upheld the authority of a state commission. Division 5 explained that the Supreme Court was able to render that decision only because Division 5 had not spoken. It said (p. 190):

"Thus, the situation presented in that case is dissimilar in a very material respect from that here present. There the State acted while the carrier's application for authority was still pending before us and before we had decided the matter and assumed jurisdiction over the interstate movement. Here the application has been finally adjudicated and

we have assumed jurisdiction. Accordingly, the *Eichholz* case is not authority for the proposition that the issue can be reopened and reviewed collaterally after we have finally determined the character of commerce to be interstate, have assumed jurisdiction, and have issued the certificate.'

If that declaration of the Interstate Commerce Commission is taken at its face value, that Commission could lawfully make a binding adjudication that transportation between Richmond and Petersburg was interstate. Of course that declaration is to be read in its context, and the I. C. C. would presumably admit that it could not, by its mere say so, transmute intra into interstate commerce.

When the actual physical movement of the vehicle crosses the state line and back again the question of whether it thereby escapes state regulation depends on whether the movement was '*bona fide*.' Whether the movement was *bona fide* cannot be permitted to depend on the carrier's state of mind. The test must be whether an ordinarily prudent carrier not restrained by regulation would use that route. The defendant drives 160 miles from Roanoke to Wytheville not because that is a sensible way to go but because it crosses the line into West Virginia. No *unregulated* carrier would do such a thing. Our conclusion is that when a carrier follows a circuitous route for the purpose of escaping state regulation he does not escape it. And we judge his purpose not by what he says his purpose is; but by what it appears to be from looking at a highway map.

In *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641 (1939) the carrier hauled freight from St. Louis, Missouri, to Kansas City, Missouri, through his terminal in Kansas City, Kansas, which was located less than half a mile from the Missouri line. In holding that the state commission had jurisdiction, the court said (p. 274):

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid * * * We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected * * * If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint * * *"

In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633 (1948), a carrier of passengers between termini in New York transported them over a route 42% of which was in other states. New York imposed a gross receipts tax on the total operation, and the New York Court of Appeals held that 'This is not interstate commerce.' The Supreme Court held that only 58% of the gross receipts could be taxed in New York. The court's opinion intimates that the *Eichholz* test is still valid, saying (p. 660):

"There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New

York's taxation. Compare, e.g., *Eichholz* v. *Public Serv. Commission*, 306 U. S. 268, 83 L. ed. 641, 59 S. Ct. 532, and *Ryan* v. *Pennsylvania Pub. Utility Commission*, 143 Pa. Super 517, 17 A 2d 637. We are not dealing with a necessary deviation or a calculated detour."

The Motor Carrier Act of 1935 provides that a carrier seeking a grandfather certificate must prove that he 'was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made * * *' Thus the statute compels the courts to give meaning to the elusive phrase *'bona fide.'* In *Eastern Carrier Corporation* v. *United States*, 31 F. Supp. 232 (1939) the applicant, prior to 1935, transported property between terminal in Pennsylvania. First it ran through Hackettstown, about 25 miles over in New Jersey, and then established a terminal at Bridgeville, New Jersey, about five miles from the border. The Interstate Commerce Commission decided that this was not *bona fide* interstate commerce, saying:

"The fact that a terminal has now been erected at Bridgeville and the routes have been shortened by using that as a transfer point instead of Hackettstown does not give the color of genuineness to operations which, from their very inception, were fraudulent.'

The three-judge federal court agreed with the Commission, saying (p. 237):

> "The Eichholz case appears to be nearly the converse of that at bar. The Supreme Court, by the Chief Justice, stated (306 U. S. at page 274, 59 S. Ct. at page 535, 83 L. Ed. 641): 'If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use

of the interstate permit to cover such transactions, and the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint.' The language employed by the Supreme Court in the cited case, we think, casts illumination upon the common sense interpretation which must be given to the phrase *'bona fide* operation' employed in the grandfather clause of the Motor Carrier Act."

Dohrn Transfer Co. v. *Hoegh*, 116 F. Supp. 177 (1953) was a suit before a three-judge court to enjoin state officials from enforcing Section 325.6 of the Code of Iowa as amended in 1953. The 1953 amendment provided:

"It is hereby declared unlawful for any motor carrier to transport over a regular route or between fixed termini any person or property, for compensation, from any point or place in the state of Iowa to another point or place in said state irrespective of the route, highway or highways traversed, *including the crossing of any state line of the state of Iowa,* or the ticket or bill of lading issued and used for such transportation, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation." (Italics supplied)

This statute is right in the teeth of 49 U. S. C. A. § 303 (10) which provides:

"The term 'interstate commerce' means commerce between any place in a State and any place in another State *or between places in the same State through another State*, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." (Italics supplied)

The court refused to hold Section 325.6 void on its face, for the reason that it could be enforced to the extent permitted by the *Eichholz* test without conflicting with the federal statute. The court said (p. 189):

> "In situations such as those disclosed in the case of *Eichholz* v. *Public Service Commission of Missouri*, 1939, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641, the commerce clause would not be an impediment to the enforcement of the provisions of Section 325.6 as amended or to its applicability.
>
> "It is not deemed necessary in the present case to make a declaration as to the constitutionality of Section 325.6 as amended. The plaintiff will be afforded adequate relief by treating the provisions of that Section as not applicable to the plaintiff and enjoining the members of the Iowa Commerce Commission accordingly."

The court took a realistic and common sense view of both statutes. It did not take either the federal statute or the state statute literally. It construed both of them in conformity with the rule laid down by the Supreme Court in *Eickholz*, namely, that a movement over a state line is subject to state jurisdiction if the movement is abnormal. The essence of the *Eichholz* rule is contained in the Supreme Court's quotation (at p. 271) of the District Court's finding that the carrier's route was not 'the normal, regular or usual route.'

There can be no doubt whether a route is normal, regular or usual.

In the *Dohrn Transfer Co.* case the routes followed by the carrier through Illinois between towns in Iowa were normal, regular and usual because bends in the Mississippi river made it normal, etc., to cross the river over and back.

To illustrate this point the court gives a table of miles on page 180 of its opinion showing that the routes through Illinois were either the same as, shorter than or not more than three miles longer than the intrastate routes in Iowa.

We have no doubt that the shipments set forth in the rule to show cause were subject to regulation by Virginia within the rule laid down in the *Eichholz* case. That rule clearly does not authorize the defendant to carry a parcel across the state line and then bring it back into Virginia over the same route. It would not be normal, regular or usual to transport goods from Roanoke to Bluefield, W. Va., and back to Salem or back to Pearisburg.

King, Chairman and Hooker, Commission, concur."

In applying the Eichholz rule there might be some situations in which reasonable men might differ as to whether a given route is "the normal, regular or usual route." Because of that possibility the following letters were exchanged between counsel for the carrier and commerce counsel:

"Washington 6, D. C.

July 12, 1956.

William C. Seibert, Esquire
Commerce Counsel
State Corporation Commission
Commonwealth of Virginia
Richmond, Virginia

"Dear Mr. Seibert:

"Yesterday I received from the Virginia State Corporation Commission its order holding that the operations complained of in case No. 13074 Commonwealth of Virginia v. Service Storage and Transfer Company, Inc., constitute operations in intrastate commerce in violation of certain provisions of the code of Virginia. I am reporting the results of this proceeding to officials

of the company with recommendations and I expect to be advised on the company's intentions in respect to appeal or other action by July 20, 1956. In the circumstances, may I request that the effectiveness of the commission's order be delayed until August 1, 1956, so that the company may make determinations as to what future action, if any, should be taken.

"I desire to re-emphasize that it is the company's intention to comply with both the law of Virginia and the requirements of the Interstate Commerce Commission and the certificate which the carrier holds. As we advised your Commission during the course of the hearing on this matter, the carrier is anxious to be informed with some degree of certainty as to what it may or may not do in transporting shipments between Virginia points through the gateway of Bluefield, West Virginia. The opinion of the Commission itself recognizes (Page 2, second paragraph) that 'transportation from points in a state to another point in the same state is *sometimes* interstate commerce.' The carrier's position on the matter is that it is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not. In an effort to avoid protracted litigation on the question, we respectfully request your office to advise us informally as to what its judgment is on the matter. For as you can understand in the absence of an authoritative guide or standard, the carrier would continue to subject itself to prosecutions and fines on the acceptance and transportation of any shipment moving from one Virginia point to another. The carrier and its officials are fully aware that the problem is one that has a 'twilight zone' and presents difficulty for your enforcement staff. It believes, however, that the continued attitude of cooperation between the carrier and your office may result in an appropriate solution to the problem.

Very truly yours,

Francis W. McInerny."

"COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
Richmond

July 13, 1956.

Francis W. McInerny, Esquire
1625 K Street, N.W. Washington 6, D. C.

Dear Mr. McInerny:

Company, Incorporated.

"A reasonable time is given for the payment of fines assessed by the Commission. We shall expect this fine to be paid in that time.

"Concerning the statement in your letter that the carrier is entitled to know what standards or guides are to be used in determining when a particular movement constitutes interstate commerce and when it does not, I will advise you that it appears to me you have a choice of two courses. Under the Rules of Practice and Procedure of this Commission, and I am enclosing a pamphlet containing these rules, you may ask for a declaratory judgment. This is referred to under Rule 13 as shown in the pamphlet attached. The alternative it appears to me, is to reach an agreement as to what might be considered interstate movement and what might be considered (sic) and what might be considered

"I have your letter of July 12, regarding the decision of this Commission in Case No. 13074 in which a fine of $25.00 and costs was assessed against the Service Storage & Transfer intrastate movement on shipments in the territory served by the Service Storage and Transfer Company, Incorporated. I believe, as I stated to you before, that we could reach some sort of an agreement as to what points we would consider as properly interstate and unless we received a complaint with respect to the movement we would allow our investigators to observe the same understanding. This agreement might be reached after a conference between us.

"I am sure you understand that it is our desire to cooperate with you and your client at all times. We are here to assist as well as to regulate.

Very truly yours,

William C. Seibert
Commerce Counsel."

Thereafter our inspectors on the highways reported that the defendant had not changed its method of doing business; and the rule in the present case was issued. The rule came on for hearing on November 29, 1956, and the evidence and argument followed the same pattern as in the prior case. Counsel for the defendant asked leave to file a brief and leave was granted on the assumption that the defendant would abide by the law laid down in the prior case in the meantime.

The final judgment in this case was entered on February 26, 1957. The judgment describes ten routes that the carrier has served in intrastate commerce and fines the defendant $500 for each of ten violations.

Counsel for the defendant makes the point that the Interstate Commerce Commission has jurisdiction to interpret the meaning of its own certificates. We do not find in the record evidence that that Commission has interpreted the defendant's certificate to mean that it is authorized to do what we have punished it for doing. There are of course limits on the authority of a federal commission to interpret certificates issued by it. It could not, under the guise of interpretation, enlarge the authority delegated to it by Congress or the power delegated to Congress by the Constitution.

Because of our federal form of government the present case is of great importance to the states. If the contentions so earnestly advanced by counsel for defendant are correct, it would follow that a carrier holding a federal certificate

of convenience and necessity to operate over Route 1 between Baltimore and Richmond could do the following things: (1) It could pick up freight in Alexandria, take it to Washington and bring it to Richmond. (2) It could pick up freight in Richmond, take it to Washington and bring it back to Ashland.

If the defendant is right in saying that its certificates *permit* it to haul by circuitous routes between Virginia cities, it necessarily follows that its certificates *compel* it to perform those circuitous movements. A common carrier *must* render all the services that its certificate *authorizes* it to render.

In issuing certificates of convenience and necessity the regulatory bodies are required by the governing laws to issue no more certificates than are necessary to serve the public. State certificates cannot authorize a carrier to cross the state line. If federal certificates can authorize the movement of goods from Richmond to Ashland or Richmond to Petersburg the state regulatory pattern will be destroyed and the beneficent purposes of the state laws cannot be accomplished. Our conclusions are (1) The Constitution does not authorize Congress to regulate the transportation of a parcel consigned from Roanoke to Salem; (2) Congress has not authorized the I. C. C. to regulate the transportation of a parcel consigned from Roanoke to Salem; (3) The I. C. C. has not authorized the defendant to transport a parcel consigned from Roanoke to Salem. The defendant may transport freight from one Virginia city to another only when a normal, regular or usual route between the cities crosses the state line.

Hooker, Commissioner, concurs.

APPENDIX IV

Richmond

SERVICE STORAGE AND TRANSFER COMPANY, INC.

v.

COMMONWEALTH OF VIRGINIA

March 10, 1958

Record No. 4748

Present, All the Justices.

WHITTLE, J., delivered the opinion of the court.

This is an appeal of right from an order of the State Corporation Commission wherein Service Storage and Transfer Company, Inc. (hereinafter called Service) was fined $500 for each of ten alleged violations of Chapter 12, Title 56, Code of Virginia, 1950, the aggregate of the fines being $5,000.

The case grows out of a prosecution of Service under § 56-304.12 of the Code for allegedly operating as a common carrier in intrastate commerce on the highways of Virginia without a certificate of convenience and necessity in violation of § 56-278.

Service is a common carrier by motor vehicle, operating under authority of Certificate No. MC-30471, issued by the Interstate Commerce Commission. The territory covered in the certificate follows:

"Between Bluefield, Va., Bluefield, W. Va., and points and places within five miles of Bluefield, W. Va.

[1] "Between Bluefield, Va., and points and places within five miles of Bluefield, Va., and those within five miles of

Bluefield, W. Va., respectively, on the one hand, and, on the other, points and places in that part of Virginia and West Virginia within 75 miles of that territory.

[2] "Between Bluefield, W. Va., on the one hand, and, on the other, points and places in West Virginia, that part of Virginia west of U. S. Highway 29 and south of U. S. Highway 60 including points and places on the indicated portions of the highways specified, and that part of Virginia north of U. S. Highway 60 which is within 80 miles of Bluefield, W. Va."

The manifest object of the Interstate Commerce Commission's certificate was to permit Service to engage in interstate commerce. This is the extent of the commission's jurisdiction. Under the ICC certificate Service was empowered, (1) to gather freight within the defined territory and transport it out of Virginia into other jurisdictions; and (2) to gather freight within the defined territory, haul it out of the State and thence back to points within the defined territory, provided it acted in good faith and did not route the freight out of Virginia for the purpose of evading Virginia's jurisdiction. We are here concerned with the latter right.

It is contended by the Commonwealth that Service operates between points in Virginia by way of Bluefield, West Virginia; that the routes employed are not the usual or normal routes but are circuitous routes used for the purpose of evading the Virginia law; that Service was fined on July 9, 1956 for similar violations from which no appeal was taken; that since the imposition of that fine Service has continued to violate the rule issued by the State Corporation Commission, resulting in the issuance of the present rule which is the basis for the fines involved on this appeal.

A fine of $500 was imposed upon Service for goods shipped by alleged circuitous routes in each of the following instances:

Origin	*Destination*
Roanoke, Virginia	Glen Lyn, Virginia
Lynchburg, Virginia	Draper, Virginia
Roanoke, Virginia	Wytheville, Virginia
Bristol, Virginia	Carbo, Virginia
Bluefield, Virginia	Haysi, Virginia
Bristol, Virginia	Wise, Virginia
Roanoke, Virginia	Kimbleton [Kimballton], Va.
Bristol, Virginia	Cranes Nest, Virginia
Lynchburg, Virginia	Marion, Virginia
Roanoke, Virginia	Abingdon, Virginia

It was stipulated that each shipment went through Bluefield, West Virginia.

The Commonwealth established by uncontradicted evidence that Service did not follow the usual or normal route between the points involved. It was urged that the goods in question had been shipped by Service over unnecessarily long and circuitous routes for the sole reason that it did not hold a certificate of convenience and necessity from the State Corporation Commission of Virginia.

The several charges against Service were developed by the Commonwealth as follows:

On August 21, 1956, an investigator of the Division of Motor Transportation of the State Corporation Commission stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, on which was found a shipment from Rish Equipment Company, Roanoke, Virginia, to the Heron Todd Steel Construction Company, Inc., Glen Lyn, Virginia. This shipment had moved from Roanoke to Bluefield, West Virginia, and thence back to Glen Lyn, whereas the usual or normal route would have been direct from Roanoke to Glen Lyn, entirely within the State.

On August 22, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, where he found a shipment from Norfolk and Western Industries, Inc., Lynchburg, Virginia, to Sutphin and Jackson, Draper, Virginia. This shipment had moved from Lynchburg to Bluefield, West Virginia, and thence back to Draper, when the usual or normal route would have been from Lynchburg to Draper, wholly within the State.

On September 6, 1956, an investigator stopped a truck owned by Service on Route 460, one mile north of Pearisburg, Virginia, wherein he found a shipment from Leonard Electronics, Roanoke, Virginia, to Wytheville Vance Company, Wytheville, Virginia. This shipment moved from Roanoke through Bluefield, West Virginia, and thence back to Wytheville. The usual or normal route for this shipment would have been from Roanoke to Wytheville, wholly within the State.

On September 11, 1956, an investigator stopped a truck owned by Service on Route 58 near St. Paul, Virginia, on which he found a shipment from Bristol Steel and Iron Works, Bristol, Virginia, to Link Belt Company, Carbo, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, and thence back to Carbo, when the usual or normal route would have been from Bristol to Carbo, wholly within the State.

On September 11, 1956, a truck owned by Service was stopped by an investigator on Highway 58, near St. Paul, Virginia. The truck contained a shipment from F. D. Lazenby and Company, Bluefield, Virginia, to Haysi Hardware Company, Haysi, Virginia. This shipment went from Bluefield, Virginia to Bluefield, West Virginia, and thence back to Haysi, and did not take the usual or normal route which lies wholly within the State.

On September 13, 1956, another shipment was involved, from Bristol Steel and Iron Works, Bristol, Virginia, to Quesenberry Construction Company, Wise, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Wise, when the usual or normal route would have been from Bristol to Wise, wholly within the State.

On September 17, 1956, an investigator stopped a truck owned by Service at the junction of U. S. Highway 58 and 72, at Coeburn, Virginia, on which he found a shipment of iron railway car wheels from Enterprise Wheel and Car Corporation, Bristol, Virginia, to Banner Fuel Corporation, Cranes Nest, Virginia. This shipment moved from Bristol to Bluefield, West Virginia, thence back to Cranes Nest, when the usual or normal route would have been from Bristol to Cranes Nest, wholly within the State.

An examination of the maps of the State of Virginia, introduced as exhibits, showing the network of improved roads between the points here involved, conclusively shows that the routes used by Service in moving the various shipments were not the usual or normal routes. The commission was justified in finding, on this uncontradicted evidence, that Service had used these circuitous routes in an effort to bring the shipments within the purview of the authority granted under its certificate from the Interstate Commerce Commission.

[1] Service assigns six errors, the first four of which can be embodied in the question: Is the State Corporation Commission vested with the authority to regulate intrastate commerce in these instances and, if so, did it act within the grant of that authority in assessing the fines upon Service? Service thus contends that the action of the State Corporation Commission is beyond its jurisdiction. Section 56-278, Code of Virginia, 1950, reads:

"§ 56-278. REQUIRED CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.—No common carrier by motor vehicle or restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted."

It is clear from the above section that the State Corporation Commission is vested with authority to issue certificates of public convenience and necessity in proper instances where a common carrier by motor vehicle applies for same. The obvious purpose of the section is to give the Commission control over intrastate traffic on the highways of the Commonwealth. It is conceded that Service did not hold such a certificate.

The governmental regulation and supervision by a State of its internal commerce may lawfully be exerted through validly constituted administrative commissions or boards. *Pa. R. R. Co.* v. *Towers*, 245 U. S. 6, 62 L. ed. 117, 38 S. Ct. 2, L.R.A. 1918C 475.

A commission, if authorized by the law of the State, may make orders and regulations concerning intrastate commerce which do not conflict with the enactments of Congress, and its discretion in this respect may be exercised upon a view of all existing relevant facts and circumstances. *Ill. C.R.R. Co.* v. *De Fuentes*, 236 U. S. 157, 59 L. ed. 517, 35 S. Ct. 275.

It will be observed that the commerce here involved moved from points in Virginia through Bluefield, West Virginia, and then back to points in Virginia. Service argues in its brief that such movements constitute interstate commerce as defined by its ICC certificate. It says:

"The carrier (Service) also accepts for transportation shipments moving from one Virginia point within the described territory to a second Virginia point within the described territory. This is done by using the two separate grants set forth above in combination (meaning paragraphs 1 and 2 in its ICC certificate heretofore quoted). It is as though two independent carriers were interchanging freight, one with the other, at Bluefield, West Virginia. To exemplify, upon receiving a request to transport a shipment from Lynchburg, Virginia, to Draper, Virginia, the carrier would pick up the shipment at Lynchburg under the authority contained in the first paragraph set forth above, and transport it to its terminal at Bluefield, West Virginia. Upon arrival at that point, the shipment would be transported to the Virginia destination under the authority contained in the second paragraph set forth above."

Such a movement as suggested would be a mere subterfuge, and an attempt to divest the State Corporation Commission of its jurisdiction over intrastate commerce. 15 C. J. S., Commerce, § 24, pp. 289, 290, Footnote 18. Why ship goods from Lynchburg, Virginia, to Draper, Virginia, through Bluefield, West Virginia, when the obvious usual or normal route would be direct from Lynchburg to Draper, wholly within the State?

"Whether any transaction constitutes interstate or intrastate commerce depends on the essential character of what is done and the substantial surrounding circumstances." 15 C. J. S., Commerce, § 18, p. 278.

Of course, there are many instances in which shipments between points in the same State can properly be identified as interstate commerce, where the shipments follow the usual or normal routes between the points involved. That is not the case here. An examination of the evidence which includes the map exhibits of Virginia and West Virginia clearly shows that the "normal or usual" routes were not followed between the Virginia points involved. On the contrary, the shipments were hauled miles out of the way, over circuitous routes, in order to accomplish the purpose sought."

The reasoning employed in *Eichholz* v. *Public Service Commission*, 306 U. S. 268, 83 L. ed. 641, 646, 59 S. Ct. 532, is applicable here. There it is said:

"Appellant insists that the hauling from St. Louis over the State line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. * * * That fact, however, does not require the conclusion that the State's action for the protection of its intrastate commerce was invalid. See Lone Star Gas Co. v. Texas, 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883. We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. * * * If appellant's hauling of the merchandise in question across the State line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions, and

the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. * * *."

The reasoning employed in *Eastern Carrier Corp.* v. *U. S.*, 31 F. Supp. 232, 236, is also applicable:

"* * * Thus it may not be concluded that because a carrier transports merchandise across a state line in order to evade the orders of a state public service commission, it has thereby engaged in bona fide interstate commerce serving public convenience and necessity. Upon the contrary, the purpose which the carrier has served by such operation is a purely private purpose, the evasion of the laws of a state.

"The definition sought to be applied by the plaintiff for the phrase 'bona fide operation' is one which cannot be supported with any show of reason. This clearly appears from the authority which the plaintiff itself cites in Slagle Contract Carrier Application, 2 M. C. C. 127, 141, wherein the Commission said: '* * * The Latin words "bona fide" mean "in good faith." Webster's New International Dictionary defines "bona fide" as "in or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely." As defined in Black's Law Dictionary, the words mean "in or with good faith; honestly, openly, and sincerely; without deceit or fraud".'"

Under our dual system of government, the inherent sovereign power to regulate intrastate transportation by common carriers is reserved to the State, and within the limitation of the State Constitution the authority of the legislature is supreme in the regulation of intrastate transportation by common carriers unless such regulation in effect deprives a person of property without due process of law or materially burdens interstate commerce in violation of the Constitution of the United States. On the other hand, the power to

regulate interstate and foreign commerce is, by provisions of the Federal Constitution, vested in Congress, and has been exercised by the enactment of the Interstate Commerce Act. 9 Am. Jur., Carriers, §44, p. 453, and cases cited under Footnote 17.

The question for decision is whether the instant shipments involved intrastate or interstate commerce. Our conclusion is that under the facts and circumstances established they involve intrastate commerce and are thus amenable to the jurisdiction of State authority.

[2] Service's next assignment of error challenges the right of the State Corporation Commission to assess fines against it in the absence of a rule to show cause alleging specific violations. This assignment is directed to three alleged shipments, originating at Roanoke, Lynchburg and Roanoke, Virginia; their respective destinations being Kimballton, Marion, and Abingdon, Virginia.

The Attorney General concedes the lack of proper allegations and proof to justify the fines imposed in these three instances. This will require an amendment to the Commission's order, resulting in a reduction in the combined fines against Service from $5,000 to $3,500.

The final assignment of error reads: "The Commission erred in holding that its decision in a prior case is res adjudicata as to the issues involved in this proceeding."

In view of our disposition of the case on its merits it is not necessary to consider this assignment.

For the reasons stated the order of the State Corporation Commission is affirmed in part, reversed in part and remanded, with directions that the order be amended in accordance with the views here expressed.

Affirmed in part; reversed in part, and remanded.

APPENDIX V

§ 56-304.12. Offenses punishable by the State Corporation Commission. — The Commission may, by judgment entered after a hearing on notice duly served on the defendant not less than ten days before the date of the hearing, if it be proved that the defendant made any misrepresentation of a material fact to obtain a warrant, exemption card or registration card, has made any improper use of any warrant, exemption card, registration card, classification plate, identification marker or identifying number, has violated any law of this State regulating the operation of motor vehicles for compensation on the highways of this State, has failed to make any report required by the Commission, has failed to pay any fee or tax properly assessed against him or has failed to comply with any lawful order, rule or regulation of the Commission, impose a penalty, not exceeding one thousand dollars, which shall be collectible by the process of the Commission as provided by law.

In addition to imposing such penalty, or without imposing such penalty, the Commission may, in any such case, suspend or revoke any warrant, exemption card, registration card, classification plate, identification marker or identifying number issued pursuant to this article.

If, in any such case, it appears that the defendant owes any fee or tax to the Commonwealth, the Commission shall enter judgment therefor.

APPENDIX VI

§ 56-278. Required certificates of public convenience and necessity. — No common carrier by motor vehicle or

restricted common carrier by motor vehicle not herein exempted shall engage in intrastate operation on any highway within the State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation, and a statement of the State Highway Commission that the law applicable to the proposed route or routes has been complied with as to size, weight, and type of vehicles to be used, and a like statement as to any increase in size, weight, and type of vehicles proposed to be operated by the applicant after such application is granted.

APPENDIX VII

§ 49 U. S. C. 303

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

APPENDIX VIII

§ 49 U. S. C. 304

Investigation of complaints; orders

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed

to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.